(140-D)

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1058

EDWARD F. O'BRIEN, *et al.*,
Appellants,

v.

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF, *AMICUS CURIAE*, ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL, IN SUPPORT OF APPELLEES

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Statement

Appellants have appealed to this Court from an order of the New York State Court of Appeals entered on the decision herein (31 N Y 2d 317, 391 N.E. 2d 134) which upheld the constitutionality of the New York State Election Law (§§ 117, 117-a and 153) which enables certain enumerated categories of voters to register and vote absentee, but which makes no provision for absentee registration and voting by appellants who are detainees at the Monroe County jail awaiting trial on various charges or serving sentences on misdemeanor convictions.

Interest of the *Amicus Curiae*

This brief is filed, *amicus curiae,* by the Attorney General of New York pursuant to his statutory duty to defend the constitutionality of State statutes. The position of the *amicus* here is to uphold the right of the State, by the enactment of what this Court has referred to as "remedial legislation", to extend the franchise to those who had previously been uable to exercise it notwithstanding the fact that the legislation may not immediately encompass all classes of persons who might benefit from it.

Questions Presented

The New York State Court of Appeals refused the appellants' requests for transportation to polling places or the establishment of voting facilities at the County jail. The Court of Appeals further held that New York State Election Law, §§ 117-a and 153, pertaining to absentee voting and registration by several other categories of voters, were not applicable to the appellants and that the failure to provide these absentee rights to the appellants did not deprive them of their equal protection guarantees. The questions presented are thus:

1. Are the New York State absentee voting and registration provisions unconstitutional insofar as they do not provide for absentee voting and registration by appellants who are incarcerated in a county jail while awaiting trial or serving sentences as convicted misdemeanants?

2. Have the appellants been denied constitutional rights because of the absence of absentee registration and voting statutes of which they might avail themselves?

Legislative History of Absentee Voting

A brief sketch of the development of and changes in the New York Election Law as it relates to absentee voting demonstrates the evolutionary process which has taken place. The grant of absentee voting rights has been systematically extended to various classes of citizens by statutory amendment. Election Law, § 117, as recodified in 1909 (chapter 22) and in 1922 (chapter 588) provided absentee ballots only for those qualified voters who, on the day of the general election, would be absent from their county of residence if their "duties, occupation or business" so required and provided that such voters would be elsewhere within the United States. The foregoing requirement was noted in an opinion rendered by the New York State Attorney General in 1932, wherein it was stated that there were no provisions for absentee voting and registration by persons who were crippled and confined to their homes (1932 Atty. Gen. 114).

Although, in 1934, a Federal employee, whose occupation took him from his county of residence, was himself entitled to an absentee ballot without making personal application therefor, his wife, not being included in the statutory scheme, was required to apply for the absentee ballot in person (1934 Atty. Gen. 169). By 1937 "inmates of soldiers' and sailors' homes" and of "United States veterans bureau hospitals" were added to the list of eligibles under section 117 (see *Sheils* v. *Flynn*, 252 App. Div. 238, 300 N.Y.S. 536, affd. 275 N.Y. 446, 11 N.E. 2d 1).

In 1944 the State Attorney General stated that prior to the amendment of section 117 by chapter 71 of the Laws of

1948, an absentee ballot could not be furnished to a Federal employee rendering service at the United States Embassy in Mexico because the applicant was then required to be within the territorial limits of the forty-eight States (1944 Atty. Gen. 370).

In 1956 the New York State Election Law was amended to provide for absentee voting by qualified voters unable to appear at the time of the general election because of illness or physical disability (Election Law, § 117-a). Also added to the Election Law in 1956 was provision for absentee registration by ill and disabled voters and by those whose duties, occupation or business require them to be outside New York State (Election Law, § 153-a [Section 153-a was repealed and the subject matter reenacted as Section 153 by Laws of 1972, ch. 962, eff. Jan. 1, 1973]).

New York State Election Law, § 117, subd. (1), presently provides:

> "A qualified voter, who, on the occurrence of any general election, may be—
>
> "a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or
>
> "b. unavoidably absent from the county of his residence, or if a resident of the city of New York, from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or
>
> "c. absent from the county of his residence, or if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election
>
> may vote as an absentee voter under this chapter."

Section 117, subd. 4 enables a spouse, parent or child of a person in any of the above-enumerated categories to qualify for an absentee ballot "[w]here a person is, or would be, if he were a qualified voter, entitled to apply for the right to vote by absentee ballot".

Section 117-a subd. 1 provides:

> 1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter; but the right to apply for an absentee ballot as provided in this section shall not extend to any person having the right to aply for an absentee ballot under section one hundred seventeen on account of unavoidable absence from his residence because he is an inmate of a veterans' bureau hospital.

Decision Below

Five members of the Court of Appeals joined in holding that the New York State laws providing for absentee voting did not violate appellants' constitutional rights. Chief Judge Fuld and Judge Burke dissented in separate opinions.

After rejecting "out of hand" any scheme which would commit appellees to transporting appellants to a polling place or which would require polling facilities at the jail, the Court turned to the questions of whether appellants' incarceration is a physical disability under Election Law, § 117-a and if not, whether denial of an absentee ballot is a violation of equal protection of the law. The Court concluded that confinement to a penal institution is not a physicial disability contemplated by section 117-a.

The Court then turned to the equal protection question and stated as follows:

"Nor does the failure to provide these absentee rights deprive the petitioners of their equal protection guarantees. These provisions set forth no voter qualification nor restriction which, by its terms would deny the franchise to any group otherwise qualified to vote (*Cf. Atkin* v. *Onondaga Co. Bd. of Elections*, 31 N Y 2d 401; *Dunn* v. *Blumstein*, 405 U. S. 330; see also *Kramer* v. *Union School Dist.*, 395 U. S. 621, 626-627). Such conditions must, of course be 'necessary to promote a compelling state interest' (*Dunn* v. *Blumstein*, 405 U. S. 330, *supra; Bullock* v. *Carter*, 405 U. S. 134, 143; *Atkin* v. *Onondaga Co. Bd. of Elections*, 30 N Y 2d 401, 404-405, *supra; Palla* v. *Suffolk Co. Bd. of Elections*, 30 N Y 2d 36, 49-50).

"The underlying right which is the subject of these proceedings is not the right to vote, that right is independently guaranteed, but merely a claimed right to absentee ballots, and in some instances, absentee registration. (*McDonald* v. *Board of Election*, 394 U. S. 802, 807; *Goosby* v. *Osser*, 452 F. 2d 39, 40 [3rd Cir., 1971]). And, since these provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. (*McDonald* v. *Board of Election*, 394 U. S. 802, 809; *Goosby* v. *Osser*, 452 F. 2d 39, *supra*.) Measured in terms of this less stringent standard, at least one Federal court, on identical facts, has sustained a similar scheme under Pennsylvania law (*Goosby* v. *Osser*, 452 F. 2d 39, supra).

"In the end, petitioners' plaint is directed towards the consequences of their incarceration. In this regard, however, it is significant that they are not alone. Others, including poll watchers assigned outside their voting district, and those confined to mental institutions, to name just two groups who, absent an absentee ballot, would find it well-neigh impossible to vote, are similarly disadvantaged. Perhaps, the statutory scheme should be extended further to include all those so situated. The question has been posed before by a higher source (see *McDonald* v.

Board of Election, 394 U. S. 802, 809-810, *supra*); its resolution, nonetheless, is one for the legislature not the courts.

> "The right to vote does not protect or insure against those circumstances which render voting impracticable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design."

Chief Judge FULD, citing provisions of the State Constitution, dissented and concluded that the appellants are entitled to absentee ballots by virtue of Election Law, § 117-a. Judge BURKE concurred in Judge FULD's dissent and added that, in his opinion the precluding of absentee voting rights to the appellants is a violation of their rights of equal protection.

Summary of Argument

The basic question in this appeal concerns the extent to which the State may be required to proceed in the enactment of remedial legislation. There is not involved herein the enactment of discriminatory legislation which is designed to exclude members of a class. Rather, this case presents a circumstance where a category of persons, detainees in a county jail, has not yet been included in the continuing development of the absentee voting provisions of New York State. It is submitted by the State that the absence of such provision in its remedial legislation does not render the statutory scheme invalid and does not result in a denial of the appellants' guarantee of equal protection of the law.

ARGUMENT

POINT I

New York Election Law, §§ 117, 117-a and 153 should be judged by the traditional standards of reasonableness and rational relationship to legitimate State goals.

In the instant case, as in *McDonald* v. *Board of Election Commissioners of Chicago* (394 U. S. 802, 22 L. Ed. 2d 739) the provisions in question set forth no voter qualification or restriction such as wealth or race which denies the franchise to any group otherwise qualified to vote. It is the right to an absentee ballot rather than the right to vote which is at issue herein. Since, as in *McDonald*, the New York statutory scheme does not affect appellants' right to vote, this is, therefore, not a case for the application of the compelling state interest test (cf. *Dunn* v. *Blumstein*, 405 U. S. 330, 31 L. Ed. 2d 274; *Evans* v. *Cornman*, 398 U. S. 419, 26 L. Ed. 2d 370; *City of Phoenix, Ariz.* v. *Kolodziejski*, 399 U. S. 204, 26 L. Ed. 2d 523). Rather than being restrictive, discriminatory or "fencing out" in nature, Election Law §§, 117, 117-a and 153 are remedial in nature and serve to extend the franchise to those who would otherwise be deprived of the franchise. Under similar circumstances this Court has repeatedly held that such legislation must be reasonable and must bear a rational relation to a legitimate state goal (see e.g. *San Antonio School District* v. *Rodriguez*, ____ U. S. ____ 36 L. Ed. 2d 16 [1973]; *Fidell* v. *Board of Elections of City of New York*, 343 F. Supp. 913 affd. 409 U. S. 972, 34 L. Ed. 2d 236 [1972]; *Rosario v. Rockefeller*, ____ U. S. ____, 36 L. Ed. 2d 1 [1973]; *McDonald v. Board of Election Commissioners of Chicago, supra*).

In *Fidell* v. *Board of Elections of City of New York* (*supra*), the plaintiffs alleged a denial of equal protection as a result of New York State's failure to provide absentee ballots at primary elections. The three judge District Court held that it was sufficient that New York had demonstrated a *rational basis* for the lack of absentee balloting in primaries quoting from *Bullock* v. *Carter* (405 U. S. 134, 143, 31 L. Ed. 2d 92 [1972]) as follows:

> "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

It is submitted that the reform measures here under review, and the incidental burden not yet remedied thereby, are not subject to the stringent standard of review established by this Court. The New York State absentee registration and balloting statutes should be judged by the less stringent reasonableness test and the burden to demonstrate unconstitutionality is therefore placed upon the appellants. The statutory classifications will be set aside only if no grounds can be conceived to justify them (*McDonald* v. *Board of Elections Commissioners of Chicago*, 394 U. S. 802, 809).

POINT II

New York State's absentee ballot and registration statutes are a constitutionally valid exercise of the power of the State.

The history of the New York State absentee ballot and registration statutes, outlined *supra*, is strikingly similar to that of Illinois, described by this Court in *McDonald* v. *Board of Election Commissioners of Chicago* (394 U. S. 802, 22 L. Ed. 2d 739) as

> "not an arbitrary scheme or plan but, rather, the very opposite—a consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature." (id. at p. 811)

In New York, as in Illinois, the affected prison inmates are convicted misdemeanants and are trial detainees. In both states the inmates cannot obtain absentee ballots because they constitute one of several classes for whom the state legislatures have not provided absentee ballots. In neither state are such persons disenfranchised.[1] This is to be contrasted with the Pennsylvania statute, with which this Court was concerned in *Goosby* v. *Osser* (409 U. S. 512, 35 L. Ed. 2d 36), which affirmatively and absolutely excluded from its absentee voter provisions "persons confined in a penal institution".[2]

A review of the development of New York's absentee voter provisions *supra* since 1909 has revealed that initially only those qualified voters whose duties, occupation or business required them to be absent from their county of residence but within the United States were eligible to vote by absentee ballot. Inmates of veterans hospitals were added thereafter. The requirement of presence in the United States was then removed. Subsequently, eligibility for the absentee ballot by the spouse, parent or child of the voter[3] and absence by reason of vacation[4] was added to section 117. The absentee provisions underwent major revision by the addition of section 117-a relating to absentee

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[1] New York State Election Law, § 152, excludes convicted felons from the suffrage but not misdemeanants. Cf. Ill. Ann. Stat., Chap. 46, §§ 3-5.

[2] Pa. Stat. Ann. Tit. 25, § 2602, subd. 12.

[3] Laws of 1948 Chap. 71.

[4] Laws of 1964 Chap. 726.

voting by physically disabled persons and by the addition of the absentee registration provisions of section 153-a.[5]

To paraphrase the language of this Court in *McDonald* (*supra*), it is submitted that merely because New York has not gone still further should not render void its remedial legislation. Such legislation need not "strike at all evils at the same time". (*McDonald, supra* at p. 811; *cf. Fidell* v. *Board of Elections of City of New York*, 343 F. Supp. 913, affd. 409 U. S. 972 34 L. Ed. 2d 236; *San Antonio School District* v. *Rodriguez*, ____ U. S. ____ 36 L. Ed. 2d 16; *Katzenbach* v. *Morgan*, 384 U. S. 641, 16 L. Ed. 2d 828.)

The State has a legitimate and valid interest in the integrity of the electoral process (*Rosario* v. *Rockefeller*, ____ U. S. ____ 36 L. Ed. 2d 1, 9) and in *McDonald* (*supra* at p. 394) this Court noted that "the different treatment accorded unsentenced inmates within and those incarcerated without their resident counties may reflect a legislative determination that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates." The state legislatures have traditionally been allowed to take reform one step at a time, addressing themselves to the phase of a problem which seems most acute at the time (*McDonald, supra*). Here, as in *McDonald*, there remain several identifiable categories of voters who do not yet have access to absentee ballots (see opinion of New York State Court of Appeals, 31 NY 2d at p. 320) but, as has been shown, the State continues to pursue its course of remedial legislation and such efforts should be upheld.

There are, of course, numerous valid reasons why a defendant charged with crime may be detained pending

[5] Laws of 1956 Chap. 600.

trial rather than being released on bail (see *e.g. Carbo* v. *United States*, 82 S. Ct. 662, 7 L. Ed. 2d 769). It can no more be argued that the appellants' incarceration without absentee ballot rights is a violation of equal protection than it could be said that such incarceration unlawfully deprives them of their constitutional right to freedom of travel. "The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one." (Decision of the New York State Court of Appeals, 31 NY 2d p. 320.)

The present disability *re* voting thus experienced by the appellants by the fact of their incarceration is, it is submitted, of the type referred to by Justice BLACK in *Oregon* v. *Mitchell* (400 U. S. 112, 127, 27 L. Ed. 2d 272, 283), wherein he stated:

> "The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

The New York State system of absentee voting should therefore be upheld by the application of the principle that remedial legislation should not be invalidated merely because it does not cover all classes of persons who might benefit from it (see *e.g. Fidell* v. *Board of Elections of City of New York, supra; Dandridge* v. *Williams*, 397 U. S. 741, 25 L. Ed. 2d 491; *Katzenbach* v. *Morgan, supra*).

POINT III

The distinctions made by the New York absentee provisions are not drawn on the basis of wealth.

The appellants contend that since persons who are financially unable to post bail[6] will be detained in prison and thereby disenfranchised New York is imposing an unlawful financial test for voting. *McDonald* v. *Board of Election Commissioners of Chicago* (394 U. S. 802, 22 L Ed 2d 739), was also concerned with pre-trial detainees who were unable to post bail but this Court did not conclude therein that there had been an invidious discrimination on the basis of wealth.

It is clear that not every statutory inequality resulting from differing financial circumstances amounts to a denial of constitutional rights (see *San Antonio School District* v. *Rodriguez* ____ U. S. ____, 36 L Ed 2d 16 [1973]). The entire system will not be struck down "simply because it imperfectly effectuates the State's goals" (*id.* ____ U. S. ____, 36 L Ed 2d 16, 53). It is clear that the absentee voting statutes were not drawn to discriminate against persons on the basis of wealth and that any such incidental result is not tantamount to a denial of constitutional rights. As stated by the New York State Court of Appeals, "these handicaps * * * are functions of attendant impracticalities or contingencies, not legal design." (31 NY 2d at p. 321.)

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[6] The record does not appear to establish that any of the appellants are, in fact, in this category.

CONCLUSION

The Order of the New York Court of Appeals should be affirmed.

Dated: July 25, 1973.

Respectfully submitted,

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BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Opinions Below

The opinion of the Lower Courts as stated in the Brief for Appellants is substantially correct.

Jurisdiction

The statement of jurisdiction in the Brief for Appellants is substantially correct.

Questions Presented

The Court of Appeals of New York has left to the New York State Legislature the question of remedying the absence of provisions in the New York Election Law which would allow pre-trial detainees and misdemeanants incarcerated within the county of their residence to register and vote by absentee or other means. (New York Election Law, §§117(6), 117-a, 153-a)

The questions presented are these:

1. Does the fact that the New York State Legislature has not yet established the right to an absentee ballot or absentee registration procedure for misdemeanants and pre-trial detainees incarcerated in their counties of residence cause the above mentioned New York Election Law sections to be subject to the stringent standards of the Fourteenth Amendment.

2. Do the above mentioned sections of the New York Election Law have some rational relationship to a legitimate state end.

3. Do the above mentioned sections of the New York Election Law impose an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail.

4. Do the above mentioned sections of the New York Election Law absolutely disenfranchise the appellants.

Statutes Involved

The Brief for Appellants as to statutes involved is substantially correct. (New York Election Law, §§153-a, 117-a and pertinent parts of §117)

Statement of the Case

The State of New York has through its Election Law expanded the privilege of voting and registering by absentee methods throughout the last fifty years to include persons absent from their county of residence because of duties, occupations or business or because of illness or physical disability (in this case, such persons may still be present in their county of residence but be unable to attend the polls).

Such persons seeking to register and vote by absentee methods must provide sworn affidavits describing the facts which would cause their absence, or in the case of persons requesting absentee registration and ballots who are in a hospital or confined to their homes because of illness or physical disability, must present a

medical certificate attesting to their physical inability to register and vote in person.

There are, however, no provisions in the New York Election Law which provide the right to absentee ballot or registration to persons incarcerated in the county of their residence while awaiting disposition of their case or serving sentences as misdemeanants. It is to be noted that there are no provisions which deny such persons the aforementioned right to receive absentee ballots and to register by absentee method. The New York State Election Law is simply silent on this matter.

The issue presented is this:

Is this absence, in the New York Election Law, of provisions granting the above mentioned prisoners the right to register and vote by absentee methods, an absolute prohibition imposed upon a class from exercising the franchise, thus rendering it unconstitutional, or is it otherwise unconstitutional.

Statement of Facts

The appellants are seventy-two persons who were at the time of initiation of this law suit incarcerated in the Monroe County Jail and who alleged that they were non-felons and pre-trial detainees or serving misdemeanor sentences. Although the League of Women Voters allege they attempted to obtain procedures which would permit such detainees as aforementioned the privilege of registering and voting, there was no application to the Board of Elections by any individual who sought this privilege until October 10, 1972. Slightly before that time, the League caused to be distributed throughout the jail population application forms on which each appellant recited his residence and proclaimed his desire to register and vote (A 21a - 22a; A 25a - 28a). On the date aforementioned, these forms were presented to the Board of Elections of Monroe County, this being the last day for registration.

The Commissioners of Election, in the absence of provisions in the Election Law as above cited, refused to issue absentee forms for either registration or ballot to the seventy-two prisoners. The Board felt further that the aforementioned detainees were not qualified under the Election Law for such absentee participation in the election process.

On October 11, 1972 the appellants commenced an action in the New York Supreme Court of Monroe County for an order directing the Sheriff and the Commissioners of Election to provide some means of registering and voting the seventy-two detainees aforementioned, either by absentee means or in person, should they prove to be otherwise eligible. There is no issue here as to the right of the Board of Elections to disqualify any of these seventy-two detainees for valid grounds, such as prior felony convictions or non-residence in the community, or any other valid ground under the New York Election Law. The issue is, can the Board of Elections be compelled to provide a method of registration and voting for these persons. The Supreme Court Judge ordered that those persons who had registered prior to incarceration be allowed to vote by absentee ballot but that those who had not registered should be denied the absentee ballot. Both parties appealed to the New York State Appellate Division, Fourth Department, which Appellate Court held that the appellants should be allowed to register and vote by absentee means in that they were unable to appear because of physical disability and thus came under the New York Election Law. The appellees herein immediately appealed to the New York Court of Appeals, which, on November 3, 1972, reversed the Appellate Division. The New York Court of Appeals held that the sections referred to by the Appellate Division involving physical disability refer to a medically disabled person and the fact of confinement to a penal institution does not entitle a voter to avail himself of these absentee privileges (P. 319). The Court held further that the underlying right which is the subject of these proceedings is not the right to vote but merely a claimed

right to absentee ballots and/or absentee registration. Since these provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. (P. 320) The Court held that:

> "Under the circumstances and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged (poll watchers assigned outside the voting districts) it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then are functions of attendant impracticality or contingencies in legal design." (PP. 320-321)

From this decision, the appellants filed a Notice of Appeal to the United States Supreme Court. Probably jurisdiction was noted on May 7, 1973.

SUMMARY OF ARGUMENT

Do New York's absentee voting provisions absolutely disenfranchise the appellants, and if so, are they unconstitutional when evaluated under the most stringent equal protection standards

This Court has stated in such cases as *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), *Evans v. Cornman*, 398 U.S. 419, 421-422, 426 (1970) and *Reynolds v. Sims*, 377 U.S. 533, 562 (1963) that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standards. This principle has been cited by the appellants to promote their cause. The appellees disagree and argue that there has been no showing on the record that the appellants are absolutely disenfranchised in that (1) there is no showing that the appellants as a class could not vote by any other means, or (2) that any more than a small proportion of that class would be incarcerated during the time for registration or voting.*

*None of this class will be incarcerated for more than one year and most will be incarcerated for a fraction of a year.

However, even if this Court should feel that the class in question is absolutely disenfranchised, applying the most stringent standard of the equal protection clause would not render the New York statutes unconstitutional as the New York statutes show a rational relationship to a legitimate state end, i.e. these statutes expand the right to vote by absentee method to classes heretofore excluded, and that the fact that a class is excluded by omission doesn't render the statute unconstitutional.

Do the New York statutes in question create so severe a restriction on the franchise as to constitute an unconstitutionally onerous burden on the exercise of the franchise

In *Rosario v. Rockefeller, 36 L. Eds. 2d,* 1, 6 and 7 (1973), this Court has held that even those restrictions on the franchise which fall short of an absolute prohibition on voting may constitute an unconstitutionally onerous burden on the exercise of the franchise by their severity. The New York statutes in question impose no such burden upon the franchise but expand such franchise to those hitherto excluded.

The fact that a statute fails to remedy every ill or include every possible class in its purview does not render the same unconstitutional. The creation of new rights are particularly a function of the legislature. *Morgan v. Kennedy* 331 F. Supp. 861, at 863 (1971)

Do the New York statutes create an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail

The Court's ruling in *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1964) and those following forbids the state' imposing the payment of a tax to vote. These New York statutes in question involve the right to register and vote by absentee ballot. There is no imposition of a tax or a financial test upon the appellants.

ARGUMENT I

Do New York's absentee voting provisions absolutely disenfranchise the appellants, and if so, are they unconstitutional when evaluated under the most stringent equal protection standards

It must be conceded that this Court has clearly established the principle that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standard. *Dunn v. Blumstein*, supra.

However, this Court has also established the principle that citizens have the power to impose voter qualifications and to regulate access to the franchise in other ways. *Carrington v. Rash*, 380 U.S. 89, 91 (1965). *Oregon v. Mitchell*, 400 U.S. 112, 114 (1970). Such qualifications must be closely scrutinized in light of the Constitution. In the instant case as in the case of *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969) a constitutional attack is made upon state statutes which expand the franchise through absentee means to the classes heretofore excluded because of absence from the county of residents or because of physical incapacity, because such statutes do not include within their scope pre-trial detainees or misdemeanants incarcerated in their counties of residence. We have here an issue thus not of the right to vote, but rather the right to vote or to register by absentee methods. There is no question either of an absolute prohibition on appellants' right to franchise because the class under discussion has not been thought to be absolutely prevented from registering or voting. Only those members of the class who are incarcerated during registration and voting days are excluded and even those persons could have voted by absentee methods should they be residents of other counties.

It is to be remembered that none of the above classes could be incarcerated for more than one year and most are incarcerated for smaller fractions of a year.

A reading of the statute further indicates that the statute itself does not specifically and intentionally exclude this class of person and merely fails to provide for such a class from enjoying the privilege of voting by absentee method.

The class of person disenfranchised because of incarceration is so small that even the stringent application of the Fourteenth Amendment does not render the failure to include them under New York statutes unconstitutional.

The Court of Appeals of New York State was not unreasonable in holding that these statutes are not repugnant to the Fourteenth Amendment because the handicaps imposed upon the appellants "are functions of attendant impracticalities or contingencies, not legal design." *O'Brien v. Skinner, et al.*, 31 N.Y. 2d 318 (1972). Certainly, it is not suspected classification based on wealth or race. *Harper v. Virginia Board of Elections*, supra. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

Should this Court order the State of New York to provide means for registering pre-trial detainees, this Court could be venturing deeply into the political thicket, making decisions best left to the Legislature.

Courts should not lightly intrude upon functions which are properly within the assigned powers of the legislature, unless the legislature fails to comply with constitutional requirements — after being given an opportunity to do so. *Montano v. Lee*, 298 F. Supp. 862 (1966) at 864.

A rational view of this Court's holdings regarding the franchise indicates that this Court will not permit a state to embark upon a course of disenfranchising classes of persons for such reasons as wealth, the color of their skin or their sex. It is indeed reasonable for a Court to hold such classifications to be improper. However, it is not unreasonable for a state to exclude persons who are absent from their polling place from voting. The fact that they have nonetheless extended this privilege to certain persons who are absent from their polling place, does not taint

the statutes conferring this privilege with a violation of the Fourteenth Amendment because other persons have not been included in the privilege. To do so would be to make the Supreme Court of the United States a super-legislature. It is interesting to note that nowhere has it been shown that any efforts were made by the appellants to have the New York State Legislature include them as a class under the purview of the statutes in question.

ARGUMENT II

Do the New York statutes in question create so severe a restriction on the franchise as to constitute an unconstitutionally onerous burden on the exercise of the franchise

The appellants cite *Rosario v. Rockefeller*, supra, and allege that even if these statutes should fall short of an absolute prohibition on voting, they constitute an unconstitutionally onerous burden in the exercise of the franchise by their severity. However, it is obvious that these statutes in question impose no burden upon the franchise, but indeed expand the franchise to classes of persons who heretofore have been denied that privilege.

The appellants rely heavily on *Goosby v. Osser*, 409 U.S. 512 (1973) in an attempt to distinguish *McDonald*, supra, from the instant case. The Pennsylvania statutes in *Goosby v. Osser*, supra, specifically excluded pre-trial detainees from obtaining the privilege of absentee ballot. The New York statutes, like the Illinois statutes in *McDonald*, supra, are silent on this subject. Therefore, it would certainly be reasonable for this Court to hold that *McDonald*, supra, does not foreclose the Lower Courts from inquiring in *Goosby* as to whether or not the Pennsylvania statutes are constitutional.

However, in the case where the exclusion is not specifically mentioned, as in the New York case, this Court has upheld similar statutes in *McDonald*, supra. It may be beneficial for the

community to include pre-trial detainees in the franchise. On the other hand, it may be wise for a community to exclude such persons for such reasons as to prevent the widespread voting of jail prisoners by corrupt political machines.

There are many conceivable issues which should be weighed by a legislative body when considering extension of the absentee ballot and this Court has neither the time nor the constitutional mandate to go into this consideration when it appears that there is no question here of a class being unconstitutionally denied its franchise. The question of extending the right to an absentee ballot is a legislative one.

This issue seems clearly a legislative issue. The fact that a statute fails to remedy every ill or include every possible class in its purview, does not render the same unconstitutional. The question of new rights are particularly a function of the legislature. *Reynolds v. Sims*, supra.

ARGUMENT III

Does the New York statute create an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail

Unlike the poll tax which would exclude any citizen from voting who could not afford to pay the same, or unlike the imposition of property qualifications, the New York statutes merely refer to the extension of the right to vote by absentee methods to classes heretofore denied the same. It does not impose a financial test on anyone. It is merely a circumstance that a person is incarcerated in jail and is required to meet bail. The bail laws were not created to prevent a person from voting but to assure the presence of a prisoner before the Court. The class of persons so denied the franchise is so small and the class of persons thus discernable is so shifting and imprecise* as to render them not in

*Such persons would frequently be convicted of a felony before they receive the absentee ballot but subsequent to registering. Others would complete their sentences as misdemeanants and leave jail without return addresses. Others would make bail and disappear.

any way within the same class referred to in *Harper v. Virginia Board of Elections*, supra, or other classes declared by this Court to be suspect.

Any person familiar with the thrust of our constitutional history is certainly not alarmed by this Court's decision outlawing such financial tests as the poll tax or property qualifications but to extend to persons held because they cannot meet bail the same stringent standards applied to those who could not pay their poll tax, would be extending unreasonably the protection of the Fourteenth Amendment.

If it is constitutional for states to impose bail thus allowing those who can post it to remain at large and those who cannot post it to remain incarcerated, it is certainly not an unconstitutional financial test because some persons who make bail can go to their polling place to vote while those who cannot are denied the franchise.

CONCLUSION

For the reasons stated, the judgment appealed from should be upheld.

Respectfully submitted,

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